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# FOREIGN INVESTMENT PROTECTION: IS INSTITUTIONAL ARBITRATION AN ANSWER?

EARL SNYDER\*

There seems to be considerable consensus—indeed, one might say virtual unanimity—on the position that one of the deterrents to a greater flow of investment capital to newly developing countries is the high incidence of non-business risk (*e.g.*, “creeping” or outright expropriation without adequate, prompt and effective compensation, currency controls and inconvertibility, export and import controls, political and social instability).<sup>1</sup> This deterrent does not admit a single, all-encompassing solution. It has been attacked (or attempts have been made to attack it) from several different viewpoints.

One viewpoint is termed *unilateral*. This includes assurances by newly developing countries (constitutional provisions, statutory enactments, executive policy statements) that private foreign investment will be allowed to develop safe from harassment and confiscation within the framework of the economy of the country in which the investment is made.<sup>2</sup> (Investment guarantees by the government of the capital exporter also fall within the ambit of this concept.)

A second—almost corollary of the first—is the *bilateral* approach.

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<sup>1</sup> See, *e.g.*, INT'L L. ASS'N, REPORT OF THE COMMITTEE ON INTERNATIONAL COMMERCIAL ARBITRATION 84 (1960); Domke, *The Arbitration of International Investment Controversies*, in AM. SOC'Y INT'L L., SECOND INTERNATIONAL INVESTMENT LAW CONFERENCE 1, 2 (1958); *The Promotion of the International Flow of Private Capital*, U.N. ECOSOC COUNCIL OFF. REC. 29th Sess., Agenda Item No. 5, at 63 (E/3325) (1960) [hereinafter cited as U.N. Doc. No. E/3325]; address by Lord Shawcross, Societe Royale d'Economie Politique de Belgique, December 15, 1959; address by the Prime Minister of Malaya, United Nations Economic Commission for Asia and the Far East, March 5, 1958; *cf.* MYRDAL, AN INTERNATIONAL ECONOMY 109-10 (1956). Another important deterrent is, of course, lack of broad domestic markets in newly developing countries assuring reasonable prospects of profitability of large scale investments. See, *e.g.*, Hazerd, *Latin America's Capital Requirements*, in [1958] PROC. AM. SOC'Y INT'L L. 205, 207.

<sup>2</sup> U.N. Doc. No. E/3325, at 64-66.

For example, where an investment guaranty scheme is embodied in a treaty between capital exporting and importing states, the concept becomes bilateral. Indeed, any agreement between two states affording an opportunity for and protection of private foreign investment is encompassed within this approach.<sup>3</sup>

The third approach is a *multilateral* one. It envisages a code or convention or agreement among a group of capital exporting and importing states (ideally, the convention would be ecumenical) to facilitate the flow of private investment capital from those countries having it to those countries needing it.<sup>4</sup> There are those attempting to advance this concept;<sup>5</sup> there are those who believe it will not bear fruit in the foreseeable future.<sup>6</sup>

Perhaps the overweighing conclusion gleaned from a careful consideration of these approaches is this: no matter what method is adopted to facilitate the flow of private investment capital to newly developing countries, there will be controversies and disputes. This is inevitable. Any other view is simply a pathological belief in the occurrence of the impossible. There must be means (other than diplomacy, mediation or conciliation) by which these disputes can be resolved. Perhaps institutionalizing the means is wise; good intentions have not been enough in the past.

If there is an institutional means by which foreign investment disputes can be speedily, impartially and equitably decided—and equally important, the decision can be enforced without unconscionable delay and expense—would there not follow a greater flow of private foreign investment to newly developing nations?<sup>7</sup> Would not the certainty that disputes involving foreign investment will be fairly and expeditiously settled, encourage foreign investment in

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<sup>3</sup> *Id.* at 70-71.

<sup>4</sup> INTERNATIONAL CHAMBER OF COMMERCE Doc. No. 111/100, at 4 (1960); U.N. Doc. No. E/3325, at 71-76.

<sup>5</sup> *E.g.*, International Chamber of Commerce; International Association for the Promotion and Protection of Private Foreign Investments; British Parliamentary Group for World Government; Organization of Economic Cooperation and Development; Council of Europe.

<sup>6</sup> See, *e.g.*, RUBIN, PRIVATE FOREIGN INVESTMENT 82-83 (1956); Metzger, *Multilateral Conventions for the Protection of Private Foreign Investment*, 9 J. PUB. L. 133, 134 (1960); Snyder, *Protection of Private Foreign Investment: Examination and Appraisal*, 10 INT'L & COMP. L.Q. 469, 490 (1961); Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 240 (1956).

<sup>7</sup> Compare, Domke, *supra* note 1, at 1; Haight, *Some Legal Aspects of Private Investments in the Middle East*, in AM. SOC'Y INT'L L., SECOND INTERNATIONAL LAW CONFERENCE 1, 16-17 (1958).

newly developing countries, on the one hand; and, on the other, would it not encourage those countries to be more thoughtful in their treatment of foreign investment?

Foreign investors are naturally reluctant to attempt to adjust their grievances before a tribunal of the state allegedly causing the grievance—or in which the grievance arises. By the same token, a state which is a party to a grievance is reluctant to have its rights adjudicated by a tribunal of the state of which the foreign investor is a national.<sup>8</sup>

This leads ineluctably to settlement of disputes “under a tribunal or system of tribunals which will command general confidence as to the fairness of their judgments and whose procedure will be supported by a public opinion which will not tolerate a departure from them.”<sup>9</sup> This concept is not new nor revolutionary.<sup>10</sup>

### WHY ARBITRATION?

Arbitration has been defined as “the voluntary submission of a dispute by the interested parties to a disinterested person or persons for final determination.”<sup>11</sup> It has not always been considered a desirable answer to the problem of how to speedily, impartially and equitably resolve commercial disputes. Commentators, as well as courts, were hostile to it.<sup>12</sup> Courts based their hostility on the

<sup>8</sup> INT'L L. ASS'N, REPORT OF THE FORTIETH CONFERENCE 174-75 (Amsterdam 1938): “[T]he indispensable objectivity and impartiality [of national courts] are sometimes jeopardized by considerations of national interest; this occurs especially in cases in which considerable interests are at stake.”

<sup>9</sup> Address by Herbert Brownell, Jr. (then U.S. Attorney General), American Bar Association Convention, London, July 24, 1957. Compare address by Lord Shawcross, Societe Royale d'Economie Politique de Belgique, December 15, 1959. *Contra*, Kopelmanas, *The Settlement of Disputes in International Trade*, 61 COLUM. L. REV. 384 (1961): “An exaggerated idea of the relative importance of authoritative procedure in settlement of disputes has encouraged the position that the progress of international law depends mainly on establishing such international procedure. The recent evolution of international society shows, however, that better organization of international relations is more readily and efficiently obtained through concerted action by the subjects of international law. An effort to impose on them a supranational system for the settlement of disputes would, in the present inorganic stage of the international society, be premature.”

<sup>10</sup> See, e.g., Sohn, *Proposal for the Establishment of a System of International Tribunals*, in INTERNATIONAL TRADE ARBITRATION 63 (Domke ed. 1958).

<sup>11</sup> AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES 3 (1954).

<sup>12</sup> See, e.g., Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding*, 46 HARV. L. REV. 1258 (1933).

assertion that it "ousts the jurisdiction of the court."<sup>13</sup> There is some reason to believe the basis for this hostility initially was a pragmatic one; if the court's business decreased, the judge's income likewise decreased.<sup>14</sup>

There is today, however, a growing body of informed opinion asserting that impartial transnational arbitration<sup>15</sup> is the most feasible single means of solving disputes concerning foreign private investment, promoting the flow of capital to newly developing countries, and protecting that capital from harassment and expropriation without prompt, adequate and effective compensation.<sup>16</sup> Tan-

<sup>13</sup> Kill v. Hollister, 1 Wils.K.B. 129, 95 Eng. Rep. 532 (1796).

<sup>14</sup> Lorenzen, *Commercial Arbitration—International and Interstate Aspects*, 43 YALE L.J. 716, 721 (1934).

<sup>15</sup> The writer prefers "transnational arbitration" to "international arbitration." See JESSUP, *TRANSNATIONAL LAW* 32 (1956): "A Chile or an Indonesia feels poor for want of capital to develop its internal economy. The problems arising from these current yearnings or demands of the underdeveloped countries must be described as transnational rather than merely international, since they involve the relations of, say, Indonesia not only to the United States for example but also to the private sources of American capital and to such intergovernmental organizations as the International Bank for Reconstruction and Development." See also *id.* at 13-14, 78.

<sup>16</sup> See, e.g., U.N. Doc. No. E/3325, at 77: "This dilemma has led to the suggestion that alternative recourse be provided for such disputes before an international arbitral body. Arbitration has increasingly become a favorite method for resolving disputes arising in business relations." See also comments by Professor Louis B. Sohn, New York Regional Meeting, American Society of International Law, March 2, 1961, in AM. SOC'Y INT'L L., *REPORT OF THE NEW YORK REGIONAL MEETING 9-10 (1961)*: "It is in the general interest of the international community to have clear standards, generally accepted standards, and to have them applied impartially by an impartial tribunal. If under-developed countries are not willing to accept impartial tribunals and international standards they are going to discover that there is not going to be investment in them, and, as a result, their development is going to suffer"; BRITISH PARLIAMENT GROUP FOR WORLD GOVERNMENT, *A WORLD INVESTMENT CONVENTION?* 18 (1959): "Every participating state would bind itself to accept recourse to an Arbitration Tribunal, if a dispute should arise out of the Convention"; U.N. Doc. No. E/AC.6/ SR.282, at 5 (1960) (statement of Undersecretary, Department of Economic and Social Affairs, United Nations): "[D]espite some reservations and hesitations, there was a clear trend in favor of some means of arbitration to deal with possible disputes between public authorities and foreign investors"; *id.* at 8 (statement of representative, International Chamber of Commerce); *id.* at 9 (statement of Netherlands' delegate to EcoSoc); *id.* at 14 (statement of Afghanistan's delegate to EcoSoc); *id.* at 20 (statement of United Kingdom's delegate to EcoSoc). *Contra, id.* at 11 (statement of Russian delegate to EcoSoc). For the formless view of the United States' delegate, see *id.* at 19: "The question of an international convention on arbitration of disputes posed . . . difficulties. . . ." [A]nd the extension of arbitration procedures to disputes arising between private investors and governments raised still more complex questions. . . ."

The Association for the Protection of Private Foreign Investments has prepared, as part of its draft international investment protection code, an

gentially, some business leaders are embracing the belief that arbitration is a useful tool in the conduct of international business.<sup>17</sup>

This seems logical. Differences of opinion concerning private foreign investment must be quickly and impartially resolved to maintain amicable relations between a foreign investor and the country of investment. Arbitration can be—and in virtually every instance is—less cumbersome and speedier than judicial settlement of disputes. Nor is it so rigidly proscribed by law. Moreover, it is concerned more with common sense and justice and less with political nuances than diplomacy, mediation or conciliation.<sup>18</sup> Arbitral tribunals can take into account the needs of investment and rational standards of commercial fairness.<sup>19</sup>

In short, arbitration furnishes the most satisfactory means for parties who are nationals of different states (and subject to differing systems of law) to solve equitably differences arising out of their investment dealings. It allows a relatively speedy and flexible procedure that seems unattainable by overworked courts; it permits an imprimatur of impartiality virtually unobtainable in courts of a particular state; it allows an individual or business entity to be a party to the proceeding; it obviates a state's espousing a dispute of its national.<sup>20</sup>

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annex providing for an arbitral tribunal. *The Proposed Convention to Protect Private Foreign Investment: A Round Table*, 9 J. PUB. L. 115, 118 (1960). The International Bar Association, at both its Seventh Conference at Cologne, July 1958, and its Eight Conference at Salzburg, July 1960, passed resolutions to consider establishing new international institutions to settle disputes concerning property rights and interests of aliens—at its 1962 Conference in Edinburgh a Committee on International Arbitration Procedure for the Protection of Investments Abroad will consider this matter further. The International Law Association is working on the problem through its Committee on Nationalization and Foreign Investment. Compare Legislative Decree 2687 of Oct. 31, 1953, art. 12 (Greece) (investment and protection of foreign capital); IBRD, Loan Regs. 3-4, §§7.03, .04 (1961); INTER-PARLIAMENTARY UNION, FORTY-SEVENTH INTER-PARLIAMENTARY CONFERENCE 6 (1958) (resolution II).

<sup>17</sup> See, e.g., Rosenthal, *A Businessman Looks at Arbitration*, in INTERNATIONAL TRADE ARBITRATION 27, 32 (Domke ed. 1958): "Arbitration is one of the techniques that should have more study and attention from the business community as a whole than it has received over the years."

<sup>18</sup> Wright, *Arbitration as a Symbol of Internationalism*, in *id.* at 7-9.

<sup>19</sup> Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 637 (1958).

<sup>20</sup> This enlightened step has been urged for decades as a means of keeping political overtones out of what is almost always a non-political dispute. See, e.g., Sohn, *supra* note 10, at 65-73. Compare JESSUP, A MODERN LAW OF NATIONS 15 *passim* (1948); LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 10-11 *passim* (1950); U.N. Doc. No. A/CN.4/96, at 51,

There is little precedent or past experience in the settlement of transnational investment disputes by arbitration; on balance, this may be advantageous. There are few, if any, "still nourished memories of past disillusionment."<sup>21</sup> This leaves room for bold concepts and positive implementation. It gives opportunity for institutional arbitration with permanent administrative machinery; ad hoc tribunals composed of arbitrators of different nationalities chosen from among knowledgeable, respected, competent jurists and businessmen; adoption of a new, more generally acceptable basis for awards; and fixed rules of procedure.<sup>22</sup> It allows establishment of an appellate arbitral tribunal to aid in establishing reasonable uniformity of awards.

#### WHY REGIONAL ARBITRAL TRIBUNALS?

It is unrealistic to visualize *one* arbitral tribunal for settling disputes arising from foreign investment anywhere in the world. Such a tribunal would be unwieldy, unworkable and unwise. It would be unwieldy because to make it representative of all capital exporting and importing countries and large enough to handle the expected volume of business, its permanent administrative machinery and mode of operation would be so all encompassing that they would be unmanageable. It would be unworkable because the world is still too large to permit the economical, efficient functioning of such a tribunal. It would be unwise because newly developing, sensitively sovereign states would not be content with one tribunal necessarily farther away from their problems—psychologically and

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58 (1957) (International Responsibility Report by F. V. Garcia-Amador, Special Rapporteur of the International Law Commission): "[T]he alien . . . is a true subject of international rights." VON KNIERIEM, *THE NUREMBERG TRIALS* 28-35 (Schmitt transl. 1959), has suggested that the Nuremberg trials are an example of recognition by the international community that individuals are subjects not objects of international law. See also INT'L L. ASS'N, *REPORT OF THE THIRTY-EIGHT CONFERENCE 75* (Budapest 1934): "Professeur DE LA PRADELLE: . . . Quand, en 1920, à La Haye, dix jurisconsultes, désignés par le Conseil, ont préparé l'avant-projet du statut d'une Cour Permanente de Justice internationale, deux d'entre eux, l'un néerlandais, l'autre français, proposèrent de donner à l'individu le droit de saisir directement la Cour Permanente de Justice internationale. Le huit autres membres du Comité, pour des raisons diverses, les unes doctrinales, les autres pratiques, ne jugèrent pas le moment venu de réaliser cette réforme."

<sup>21</sup> Address by Phillip C. Jessup (then Professor and now Judge of the International Court of Justice), Columbia University Centennial Lecture, November 8, 1958.

<sup>22</sup> Compare Domke, *The Arbitration of International Investment Controversies*, in AM. SOC. INT'L L., *SECOND INTERNATIONAL INVESTMENT LAW CONFERENCE* 3 (1958).

physically—than they would like; or if it were not, capital exporting states would inevitably be wary.

An obvious solution lies in the establishment of a system of regional arbitral tribunals.<sup>23</sup> The regions should (insofar as practicable) follow geographic and ethnic lines. This would tend to bring each state not only physically closer to its arbitral tribunal, but—equally important—practicably and psychologically closer. Since the permanent administrative personnel would be composed of nationals of the states of the region, this would give those states an even greater affinity with the tribunal.

A three-man tribunal in which each of two parties chooses an arbitrator and the two arbitrators choose an umpire not a national of, nor of the same nationality as, a party, should suffice. (If there were more than one party-claimant and more than one party-respondent, all claimants together choose one arbitrator and all respondents together choose one arbitrator.) A five-man tribunal might be more desirable in infrequent cases; but, it is submitted, its desirability, on balance, would not warrant the extra expense.

There is, of course, a very real problem of how to delineate regions. Based on factors set out in previous paragraphs, it would seem perhaps reasonable to have a tribunal for: (1) Turkey, Iran, Morocco, Algeria, Tunisia, Libya, United Arab Republic, Iraq, Saudi Arabia; (2) remainder of Africa; (3) Afghanistan, Pakistan, Nepal, India, Ceylon, Burma, Thailand, Cambodia, Laos, South Vietnam, Malaya, Indonesia, Philippines, Taiwan, Japan; (4) Australia, New Zealand, and the rest of Australasia; (5) Europe, Great

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<sup>23</sup> A somewhat analogous suggestion was made as long ago as 1924 by members of the Hungarian branch of the International Law Association. This occurred at the Thirty-Third Conference of the Association in Stockholm, Sweden. The suggestion was renewed (in different form) in 1934 at the Thirty-Eight Conference of the Association: "[P]ar une série de traités conclus d'Etat à Etat, se formerait une série de tribunaux internationaux . . . de droit privé . . ." INT'L L. ASS'N, REPORT OF THE THIRTY-EIGHT CONFERENCE 77 (1938). The Hungarian suggestion in 1934 was for "an International Tribunal for civil matters competent for litigious civil matters between a private individual and a foreign State or between private individuals having their domicile in different States. The French conception [in 1934] advocates the creation of a mixed tribunal set up always by two States only and competent for differences between those two States or between one State and a subject of the other or between subjects of the respective States. Professor de La Pradelle has a regional solution in view. *No doubt it is easier to create regional organizations than universal ones.*" *Id.* at 79. (Emphasis added.) Compare INTER-PARLIAMENTARY UNION Doc. No. C/EF/58/5 (Ext.) 4 (1958).



Britain, Ireland, Israel; (6) South and Central America (excluding Mexico); (7) North American continent (including Mexico).<sup>24</sup>

Some of these regions may be cumbersome or either not geographically contiguous or ethnically similar. This may be inevitable to a degree; in any event, they are not intended to be inflexible. If experience and further reflection should indicate the desirability of different groupings, those should prevail.

The important points are to form reasonably compatible groups of states—following geographic and ethnic lines where feasible. Each group should have at least a modicum of economic, political and cultural ties. It should be able to give a component state a feeling of basic confidence in the fairness with which its disputes will be approached. To iterate, if the regions suggested above do not do this, others should be formed.

With these concepts as a background let us look at: (1) a brief conspectus and the present status of arbitration generally, and of trade and investment disputes specifically; and (2) suggestions for transnational arbitration of investment disputes.

#### CONSPECTUS AND PRESENT STATUS

Arbitration as a procedure goes back to the time of the ancient Greeks. Not only was there resort to arbitration, but as well, treaties by which parties agreed to submit future disputes to arbitration. It was, however, the latter part of the eighteenth century before arbitration was regarded as a practical method for resolving controversies; and it was the eve of the twentieth century (Hague Peace Conference of 1899) before it was recognized as a formal international procedure.

The Hague Conference created a Permanent Court of Arbitration—a misnomer since it is simply a panel of arbitrators (four of whom are selected by each signatory state) from which ad hoc arbitral tribunals may be formed.<sup>25</sup> Arbitration before this “court” is confined to disputes involving states as parties; individuals—actual or legal—may not be parties. (In any event, the Permanent

<sup>24</sup> The writer has previously suggested a tribunal for south and southeast Asia (including Australia and New Zealand), another for Africa, a third for Europe, a fourth for South and Central America (excluding Mexico), and a fifth for the North American continent (including Mexico). Snyder, *supra* note 6, at 490. Further reflection indicates that this grouping does not seem as workable as the one suggested in the text.

<sup>25</sup> FENWICK, *INTERNATIONAL LAW* 514-15 (3d ed. 1948).

Court of Arbitration has been little used; observers do not foresee greater use in the future in its present form.)

At the Hague Conference of 1907 a "Draft Convention Relative to the creation of a Judicial Arbitration Court" was prepared. This tribunal was to be permanent in fact; but it foundered—among other reasons—on a method of selection of the permanent arbitrators.<sup>26</sup>

In addition, an international prize court was created by this conference. It savored slightly of an arbitral tribunal for settlement of commercial, although not investment, disputes (*i.e.*, those which result from capture of merchant ships and commercial cargoes by belligerents in time of war). The difficult question of selection of arbitrators was solved by allowing greater powers to have arbitrators on the tribunal at all times and smaller powers periodically. (They were rotated so that the higher the political rank of the state, the longer the term of the arbitrator selected by it.)<sup>27</sup> Significantly this tribunal was never formed because states took the position that maritime law was too vague and uncertain to permit meaningful decisions based on it.<sup>28</sup>

For several centuries there has been arbitration of transnational trade disputes. But one of the first (if not the first) organized arbitral agencies established in modern international trade was the London Court of Arbitration established in 1892. The Court of Arbitration of the International Chamber of Commerce (with headquarters in Paris) was established in 1923. And the American Arbitration Association was organized in 1926. They all function vigorously today.

As well, there are facilities for arbitration of transnational trade disputes in Australia, Union of South Africa, Japan, India, Pakistan, Canada, the countries of South America, Russia and other communist states.<sup>29</sup> Today an increasing number of transnational contracts contain a provision for arbitration of disputes arising out of or relating to the contract. The arbitration is conducted according to rules promulgated by one of these bodies.<sup>30</sup>

The Court of Arbitration of the International Chamber of Com-

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<sup>26</sup> *Id.* at 517.

<sup>27</sup> *Id.* at 517-18.

<sup>28</sup> *Id.* at 518.

<sup>29</sup> Domke, *International Arbitration of Commercial Disputes*, in PRIVATE INVESTMENTS ABROAD 131, 146-49 (1960).

<sup>30</sup> INT'L CHAMBER OF COMMERCE, INTERNATIONAL COMMERCIAL ARBITRATION 5 (1960).

merce (world-wide in scope) is an administrative body providing: (1) facilities for selection of independent arbitrators of standing and competence; (2) administrative machinery for arbitration; and (3) rules of procedure. Because of its connection with the International Chamber of Commerce, newly developing countries have been reluctant to make use of it, even when there was need for them to do so.

The Foreign Trade Arbitration Commission of the All-Union Chamber of Commerce in Moscow (there are similar bodies in all communist countries) could not be expected to have reason to arbitrate transnational investment disputes; communists have made it clear there will be no private investment by foreign investors in a communist state.

This is arbitration machinery in being; it is presently devoted to arbitration of trade disputes but its jurisdiction could be extended to investment disputes. What suggestions have been made for more extensive transnational arbitration of investment disputes? And what is being done to implement those suggestions?

#### SUGGESTIONS AND IMPLEMENTATIONS

Organs of the United Nations have been active in this field. Two of them—Economic Commission for Asia and the Far East (ECAFE) and Economic Commission for Europe (ECE), however, are primarily concerned with trade, not investment, disputes. There is no reason, nonetheless, why those commissions could not extend their inquiries to arbitration of investment disputes.<sup>31</sup>

ECE has prepared a draft convention on arbitration of international trade disputes. It encompasses only member countries of ECE and is not concerned with disputes to which a state is a party—it applies to disputes between “physical or legal persons.” It was opened for signature April 21, 1961; the members of ECE imply that there are reasonable grounds for believing it may go into effect.<sup>32</sup>

<sup>31</sup> For a fuller discussion of this, see Snyder, *supra* note 6, at 483-85.

<sup>32</sup> U.N. Doc. No. E/ECE/423, at 2 (1961): “Subject to Article II, paragraph 2 of the Convention [relating to right of ‘legal persons of public law’ to conclude a valid arbitration agreement] and to paragraph 13 of this Final Act [providing that Benelux countries are free not to apply convention in whole or in part in their relations with each other], the delegations taking part in the negotiation of the European Convention on International Commercial Arbitration [Austria, Belgium, Bulgaria, Byelorussian, Czechoslovakia, Denmark, Federal Republic of Germany, Finland, Hungary, Italy, Luxemburg, Netherlands, Poland, Romania, Spain, Sweden, Switzerland, Turkey, Ukraine,

A careful reading of this draft convention persuades that it has neither the scope nor depth of an arbitration convention envisaged by the writer.

ECAFE is being aided in its work (which seems to have an excellent opportunity to be crowned with success) by the General Legal Division of the United Nations. There is an important area of common interest among member states of ECAFE; and some, at least, feel a need for encouraging enlightened private foreign investment.<sup>33</sup>

Fairly extensive and thoughtful work has been conducted by the Economic and Social Council (EcoSoc). After careful consideration, EcoSoc reluctantly concluded there is little chance for widespread acceptance of a multilateral investment protection code in the foreseeable future.<sup>34</sup> It suggests arbitration of controversies between capital importing states and private foreign investors. It tends to favor "a special arbitration tribunal or panel, of outstanding neutrality and expertise, perhaps under the United Nations' auspices, on a regional basis. . . ."<sup>35</sup>

It intimates that an individual investor should have access to the arbitration tribunal as a disputant rather than having to persuade his government to espouse his claim. It points out that this arrangement

would greatly enhance the value of the agreement to [the individual foreign investor]. Moreover, governments of capital-receiving countries which are apprehensive of the intervention of foreign governments in their disputes with foreign investors might well prefer arbitration agreements under which the latter remain the active party in interest throughout the proceedings.<sup>36</sup>

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Union of Soviet Socialist Republics, and Yugoslavia] declare that their respective countries do not intend to make any reservations to the Convention."

<sup>33</sup> See, *e.g.*, address by the Prime Minister of Malaya, United Nations Economic Commission for Asia and the Far East, March 5, 1958.

<sup>34</sup> U.N. Doc. No. E/3325, at 63-81.

<sup>35</sup> *Id.* at 81. For an interesting, earlier suggestion on how to cope with international commerce (which perhaps included, on the relatively small scale then extant, what the writer calls transnational investment) by a Hungarian publicist, see INT'L L. ASS'N, REPORT OF THE THIRTY-EIGHT CONFERENCE 82 (Budapest 1934): "The ideal from the standpoint of International Law and commerce would be: unification of laws as far as possible, impartial application of these laws by regular State Tribunals, enforcement of the judgment of these Tribunals in foreign countries, and an international Court of Appeal."

<sup>36</sup> U.N. Doc. No. E/3325, at 79-81.

The General Assembly has taken no action on this proposal although the Secretary-General accorded it a favorable reception at an EcoSoc ministerial-level meeting in June 1960. He said, "[O]ne should not exclude the possibility that some facilities, if only of a modest nature, for international arbitration in matters of foreign investments, might develop under the aegis of the Organization, or linked with the Organization."<sup>37</sup> There is no reason to believe, however, that the United Nations (or any of its organs) will vigorously pursue this approach. It has been suggested that the UN will, in all probability, prepare a list of arbitrators chosen from both capital exporting and importing countries; these will be available for ad hoc arbitral tribunals to resolve foreign investment disputes. It is not presently contemplated that arbitration will be institutionalized; no multilateral convention to formalize rules of procedure is envisaged. In short, the UN is pursuing a cautious program with a modest goal—wisely, many will assert, in order to avoid frustrating disappointment when ideal solutions and attainment of goals prove impossible.

The International Bank for Reconstruction and Development (World Bank) provides in its loan regulations—applicable to both member governments and borrowers other than member governments—for arbitration of controversies between parties to loan agreements (the bank, borrower and guarantor).<sup>38</sup> As well, the bank has lent its "good offices" for resolution of international disputes.<sup>39</sup> The difficulty, on the one hand, is that this arbitration applies only to those who borrow from the bank; on the other, the bank is not enthusiastically seeking further opportunities to solve vexed transnational disputes.

The International Institute for the Unification of Private Law has prepared a draft of a uniform law on arbitration in respect of

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<sup>37</sup> This quotation is taken from a mimeographed paper sent to the writer by Lord Shawcross, a member of the Association for the Protection of Private Foreign Investments Directing Committee. Lord Shawcross is a vocal proponent of an efficacious system of protection for private foreign investment. This paper appeared as an article in a Pakistan newspaper at the time of the International Businessmen's Conference (sponsored by the International Chamber of Commerce), at Karachi, Pakistan, December 5-8, 1960.

<sup>38</sup> IBRD, Loan Regs. 3, 4, §§ 7.03-.04 (1961).

<sup>39</sup> Its most publicized step in this direction was in resolving the controversy that evolved from nationalization of the Suez Canal; less publicized, but equally effective perhaps, was resolution of the dispute between the city of Tokyo and bondholders of the French Tranche, which had made a loan to Tokyo in 1912.

international relations of private law.<sup>40</sup> This has, however, been revised by the Council of Europe; the revised draft is being used as a basis for a draft law by a committee of experts named by the Council.<sup>41</sup>

Both the United States and United Kingdom have provided for arbitration of disputes arising out of their bilateral treaties of friendship, commerce and navigation (commerce, establishment and navigation, they are called by the United Kingdom) with submission of the disputes to the International Court of Justice if arbitration is not pursued.<sup>42</sup> The ambit of this arbitration is patently narrow.

As has been pointed out previously,<sup>43</sup> the International Bar Association (IBA), the International Association for the Promotion and Protection of Private Foreign Investments (APPI), the British Parliamentary Group for World Government (BPGWG), and the International Law Association (ILA)—all organizations that have some standing and influence in the international community—have either suggested or prepared draft conventions for transnational arbitration of foreign investment disputes.

A permanent slightly similar institution in being is the Court of Justice of the European Communities. It is not, of course, an arbitral tribunal; it represents, however, a successful, supranational, tangential development. It was established in 1958 to adjudicate disputes arising out of activities in the European Coal and Steel Community, Euratom, and more recently, the European Economic Community. It was preceded by the Court of Justice of the Coal and Steel Community which had been in existence since 1953.<sup>44</sup> But these are relatively small inroads or unimplemented suggestions on an urgent, vexing problem. More needs to be done.<sup>45</sup>

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<sup>40</sup> International Institute for the Unification of Private Law, Unification of Private Law 1954, Draft III(3).

<sup>41</sup> Letter From the Secretary-General, Council of Europe, to the writer, July 11, 1961.

<sup>42</sup> See, e.g., Treaty of Friendship, Commerce and Navigation with Japan, April 2, 1953, art. 24, [1953] 4 U.S.T. & O.I.A. 2063, 2080, T.I.A.S. No. 2863; Treaty of Commerce, Establishment and Navigation Between the United Kingdom and Northern Ireland, March 11, 1959, art. 32, Cmd. No. 698, at 20 (T.S. No. 1 of 1959).

<sup>43</sup> Note 16 *supra*.

<sup>44</sup> Donner, *The Court of Justice of the European Communities*, in *LEGAL PROBLEMS OF THE EUROPEAN ECONOMIC COMMUNITY AND THE EUROPEAN FREE TRADE ASSOCIATION* 66 (1961); see also Note, *The Court of Justice of the European Communities*, 10 INT'L & COMP. L.Q. 337 (1961).

<sup>45</sup> Compare Peck, *Our Changing Law*, 43 CORNELL L.Q. 27, 32 (1957): "[C]ommercial litigation has substantially left the courts," with Fuller,

Specifically, in the writer's view, a system of regional arbitral tribunals for resolution of foreign investment disputes must be established. And—for reasons that will be made clear later—a single appellate arbitral tribunal to which appeal from awards of the regional tribunals may lie, is necessary. Moreover, the regional tribunals should be institutionalized in regional conventions; and the appellate tribunal should be institutionalized in an ecumenical—or as near ecumenical as possible—convention.

What are the obstacles in the path of these suggestions? Are these obstacles insuperable? What solutions may be possible?

### OBSTACLES

There are obvious pragmatic difficulties.

*First:* newly developing states simply do not want to submit their foreign investment disputes to impartial arbitration. They are in a headlong dash to industrialize and modernize; they want nothing to stand in the way of a successful, speedy achievement of this goal. Moreover, impartial arbitration smacks of giving away some of their newly acquired sovereignty; this is anathema.<sup>46</sup>

*Second:* private international law is complex and tortuous; its substantive content is not free from dispute. Arbitration, of course, is not inflexibly bound by law and should (with regard to transnational investment disputes) be less bound in the future in a way the writer will point out. But to the extent that law is an ancient, tested standard keeping pace with solution of contemporary problems (and only to this extent, it is submitted), arbitral awards should not consistently fly in the face of rational legal concepts.

*Third:* even when there is provision for arbitration today, parties attempt to evade it if there is means of evasion and it is in their

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*supra* note 19, at 637: "[I]n the field of commercial law the British courts in recent years have, if I may say so, fallen into a 'law-is-law' formalism . . . . [C]ommercial cases are increasingly being taken to arbitration." The difficulty, of course, is compounded in the transnational area. There are *no* courts to adjudicate "commercial litigation" and "commercial cases."

<sup>46</sup> Compare Stone, *Law, Force & Survival*, 39 FOREIGN AFFAIRS 549, 553 (1961): "That these new states desire to maintain the utmost freedom of action in respect to their legal obligations is not only the common reaction of a debtor; it is also an expression of pride in their new-won sovereignty and of felt responsibility for its economic fate and standard of living of their peoples. . . . [I]t [leaves] them more room for maneuver, to resort to a variety of extra-legal pressures on the creditor to surrender his rights. These may range from requests for re-negotiation, repudiation, hostile propaganda and boycott, to outright confiscation and even tacit instigation of popular demonstrations and violence."

interest to do so. A well-known example is the arbitration provision in which each party agrees to appoint an arbitrator; the umpire, in turn is to be appointed either by the two arbitrators or the two parties together, after the arbitrators have been appointed. One party simply fails to appoint an arbitrator. There is no provision in the arbitration clause or agreement for appointment of an arbitrator in this event. Arbitration is impossible.

*Fourth:* some international jurists tend to regard arbitration as primarily a diplomatic procedure. To attempt to institutionalize it, to them, is heresy.<sup>47</sup> The fact that not only the pace but the character of the world has changed rapidly in the last two decades, does not appear to disturb an adamant refusal to modernize their concept of arbitration.

*Fifth:* there are vexing basic arbitral problems if arbitration is not carefully institutionalized. For example, the inviolability of the undertaking to arbitrate and the form of the *compromise*; the arbitrability of the dispute; the composition of the arbitral tribunal; the immutability of the tribunal once it has been formed; procedure before the tribunal; interpretation and annulment of the award and what to do about revision, in a proper case;<sup>48</sup> and exhaustion of local remedies. All these problems could be satisfactorily resolved, it is submitted, if arbitration were institutionalized.

A difficult problem arises because parties sometimes attempt to evade enforcement of an arbitral award after it has been rendered.<sup>49</sup>

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<sup>47</sup> U.N. Doc. No. A/CN.4/SER.A/1958/Add. 1, at 2 (1958).

<sup>48</sup> *Id.* at 1-12.

<sup>49</sup> Enforcement is a vast, complex subject having a body of knowledge of its own. A study—or even a conspectus—of it is beyond the reach of this article. For excellent references to, and bibliographies on, the subject, see AMERICAN ARBITRATION ASS'N, ARBITRATION BIBLIOGRAPHY (1954); INT'L CHAMBER OF COMMERCE, COMMERCIAL ARBITRATION AND THE LAW THROUGHOUT THE WORLD (1949, Supp. No. 1, 1951); INTERNATIONAL TRADE ARBITRATION 296-311 (Domke ed. 1958); 1 SCHOENKE, DIE SCHIEDSGERICHTSBARKEIT IN ZIVIL-UND HANDELSACHEN IN EUROPA (1944); 3 SCHOENKE & KEILWEIN, DIE SCHIEDSGERICHTSBARKEIT IN ZIVIL-UND HANDELSACHEN IN EUROPA (1956); SZLADITS, BIBLIOGRAPHY ON FOREIGN AND COMPARATIVE LAW 319-23 (1955); UNION INTERNATIONALE DES AVOCATS, INTERNATIONAL COMMERCIAL ARBITRATION (1956). For an interesting example of a difference of opinion on even a minor, non-technical aspect of enforcement of awards in international trade disputes, compare Carabiber, *Conditions of Development of International Commercial Arbitration*, in INTERNATIONAL TRADE ARBITRATION 149, 163 (Domke ed. 1958): "In this connection, it should be added that the private character of arbitration eliminates the possibility of statistics and consequently it is not generally known that 85% of arbitral awards are voluntarily complied with," with Matteucci, *Utopia and Reality in the Realm of Arbitration*, in *id.* at 189, 190:



No enforcement procedures of the sort known to a mature municipal, civil, juridical system are feasible transnationally at this juncture in world history. Moreover, the world climate is such that even the World Bank—admittedly in a strong position as a successful disputant in an arbitration proceeding—is reluctant to proceed against an adversary against whom an arbitral award has been made with those enforcement procedures currently available to it.<sup>50</sup>

At present, varying principles of law in different countries in the world as well as tortuous court procedures render enforcement of foreign arbitral awards uncertain, time-consuming and expensive. If there were a definitive world legal order and an executive (or other properly constituted force) to back it up, a different situation might prevail.

The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 was a step in the direction of resolving the enforcement problem. It gave arbitral awards some status and respectability; but because it smacked of giving up a certain amount of sovereignty, most states refused to sign or adhere to it. Moreover, the convention was not completely effective in aiding enforcement. Technical inadequacies gave those desiring to evade enforcement adequate opportunity for doing so; they were either able to persuade courts not to enforce arbitral awards, or they interminably delayed enforcement actions to the point where the expense and time consumed made ultimate enforcement an uneconomical proposition.

In May 1958 the UN convoked an international diplomatic conference to consider a new convention on the recognition and enforcement of foreign arbitral awards. This convention (drawn up by representatives of forty-five countries) was signed by twenty-three countries within the period it was open for signature (until December 31, 1958) and ratified by about half that number.<sup>51</sup>

With respect to those states which sign or accede to this con-

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"Unfortunately the willingness of parties to submit to arbitration is not matched by the willingness of a losing party to comply with an adverse award." The weight of informed view seems to favor the former position, however. See, e.g., Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1 (1960).

<sup>50</sup> BRITISH PARLIAMENTARY GROUP FOR WORLD GOVERNMENT, A WORLD INVESTMENT CONVENTION? 19-20 (1959).

<sup>51</sup> INT'L CHAMBER OF COMMERCE, INTERNATIONAL COMMERCIAL ARBITRATION 5 (1960); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1060 (1961).

vention, enforcement of foreign arbitral awards will become more certain, less time-consuming, less expensive. Generally speaking, once an award has been made, the burden of proof lies on the party against whom it is to be enforced to show that it should *not* be enforced rather than on the party attempting to enforce it to show that it *should* be enforced. There are certain specified grounds on which enforcement may be refused; absent those grounds, the arbitral award is enforced.<sup>52</sup>

Assuming that world opinion—at least as exemplified by the states involved—progresses to the point of permitting institutionalizing enforcement of an arbitral award, the problem may be satisfactorily resolved. Enforcement could be institutionalized by including provisions, similar to those in the Convention on the Recognition and Enforcement of Foreign Arbitration Awards, in the convention establishing each regional tribunal; or by a provision incorporating the former into each arbitration convention—which ever better accomplishes the desired result and seems simpler.

But at least two other obstacles remain. *First*, a paucity of arbitral awards<sup>53</sup> and *second*, a lack (with an even greater potential lack) of uniformity of arbitral awards (in controversies involving foreign investments). To put the latter another way: there is no generally accepted transnational standard of protection for foreign property;<sup>54</sup> there is bound to be lack of uniformity of awards ren-

<sup>52</sup> See Quigley, *supra* note 51, at 1066-71.

<sup>53</sup> *But see* U.N. Doc. No. E/AC.6/SR.282, at 10 (1960): "[F]rom a practical point of view, the certainty that disputes concerning the treatment of investors can be submitted to the judgment of arbitrators is even more important than the establishment of fixed rules for such treatment."

<sup>54</sup> Compare remarks of Professor Louis B. Sohn, at the American Society of International Law regional meeting on March 2, 1961, in AM. SOC'Y INT'L L., REPORT OF THE NEW YORK REGIONAL MEETING 9 (1961): "I would like to make an assertion that there is an international standard and that the standard has been observed for 150 to 200 years; or at least, there was an international standard until recently. We have slight doubts about it at this point," with those of Dr. Jorge Castaneda, Legal Adviser, Permanent Mission of Mexico to the United Nations, in *id.* at 11: "On the subject of the minimum standard: This question does not seem to me to be absolutely clear and evident. . . . It is true that very many international decisions have recognized the existence of the minimum standard, but it is also true that many other international awards and decisions have also recognized the existence of another rule that seems to run counter to the minimum standard, namely, the rule that foreigners cannot claim more rights than nationals." See Fatouros, *Legal Security for International Investment*, in LEGAL ASPECTS OF FOREIGN INVESTMENT 699 (Friedmann & Pugh eds. 1959); U.N. Doc. No. E/3492, at 70-80, 89-92 (1961); U.N. Doc. No. E/3325, at 35-62, 65-66. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, PRINCIPLES CONCERN-

dered by ad hoc tribunals in these disputes. To put the former another way: there is no well-rounded body of precedent enunciated by arbitral tribunals which have made awards in foreign investment disputes.<sup>55</sup>

This is true simply because disputes concerning foreign investment have not previously been thoroughly arbitrated although there have been some ad hoc tribunals that have made awards in this field. These awards have been largely based on general principles of law recognized by civilized nations.

Two recent examples of arbitral awards of this kind are those between: (1) the Petroleum Development (Trucial Coast) Ltd., and the Sheikh of Abu Dhabi in 1951;<sup>56</sup> and (2) the Ruler of Qatar and the International Marine Oil Company in 1953.<sup>57</sup> Both dealt with oil concessions.

In the *Abu Dhabi* case, the sole arbitrator first held that the agreement was not governed by the municipal law of any country.<sup>58</sup> Then he based his award on "principles rooted in the good sense and common practice of the generality of civilized nations—a sort of 'modern law of nature.'"<sup>59</sup>

In the *Ruler of Qatar* arbitration the referee held that the arbitration was not governed by municipal law, but by "principles of justice, equity and good conscience."<sup>60</sup>

The difficulty with the bases of these awards—many international jurists assert—is that general principles of law of the nature relied on in these two arbitrations are imprecise and difficult to authoritatively ascertain.<sup>61</sup> Although reliance on them may seem

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ING ADMISSION AND TREATMENT OF ALIENS (1961), provides at articles 11 and 12 that an alien may acquire, hold and dispose of property "subject to local laws . . . [and] conditions imposed for his admission" and that a state may nationalize or expropriate his property on payment of compensation measured "in accordance with local laws, regulations and orders."

<sup>55</sup> For the advantages of this situation, see text at note 20 *supra*.

<sup>56</sup> *Petroleum Dev. Ltd. v. Sheikh of Abu Dhabi*, [1951] Int'l L. Rep. 144 (No. 37).

<sup>57</sup> *Ruler of Qatar v. International Marine Oil Co.*, [1953] Int'l L. Rep. 534.

<sup>58</sup> The applicable clause of this agreement, article 17, stated: "The Ruler and the Company both declare that they intend to execute this Agreement in a spirit of good intentions and integrity, and to interpret it in a reasonable manner." [1951] Int'l L. Rep. at 148.

<sup>59</sup> *Id.* at 149.

<sup>60</sup> [1953] Int'l L. Rep. at 545.

<sup>61</sup> Research in this field is being carried on but it will be an extended period before anything usable in the practicable world of transnational litigation and arbitration will be available. See Hazard, *The General Principles of Law*, 52 AM. J. INT'L L. 92 (1958); Schlesinger, *Research on the General*

superficially attractive it does not commend itself for widespread acceptance.

There is a lack of uniformity of awards for three main reasons. *First*, there are few precedents; as stated above, the transnational standard of protection for foreign property is controversial and unsettled. *Second* (this is an effect of the first), arbitral tribunals rendering awards in the past have arrived at divergent decisions on similar facts; indeed, some of them have arrived at virtually opposite decisions on similar facts. *Third*, there has been no appellate arbitral tribunal, one of whose functions would have been to reconcile divergent views of arbitral tribunals of first instance and aid in establishing reasonable uniformity of awards.

There is no reason to believe (in any future system of ad hoc tribunals) that arbitral tribunals of first instance will not continue to arrive at divergent decisions on similar facts; sometimes, of course, decisions may be contra.

Taking the first obstacle (paucity of awards) first—its solution is not easy nor foolproof. Indeed, there is no a priori solution. One aspect of it has been previously pointed out by the writer.<sup>62</sup> But another aspect is an interesting and challenging one. It should appeal to those willing to push forward courageously into uncharted territory. It is this: arbitral tribunals engaged in resolving foreign investment disputes have an opportunity to fashion a "jurisprudence" in much the same way pioneering juridical or quasi-juridical bodies in the past have had to do.<sup>63</sup> It is a challenge which requires the apt welding of theory and reality.<sup>64</sup>

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*Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734 (1957.) In any event it might perhaps be less offensive to newly developing nations if the phrase "principles of justice recognized by the principal legal systems of the world" were used instead of "general principles of law recognized by civilized nations." See, e.g., use of the former phrase in *Draft Convention on the International Responsibility of States for Injuries to Aliens*, in 55 AM. J. INT'L L. 548 (1961).

<sup>62</sup> Snyder, *Protection of Private Foreign Investment: Examination and Appraisal*, 10 INT'L & COMP. L.Q. 469, 491 (1961): "[T]he basic void is lack of respected, competent regional arbitral tribunals able to arbitrate government-foreign investor disputes."

<sup>63</sup> Domke, *International Arbitration of Commercial Disputes*, in PRIVATE INVESTMENTS ABROAD 131, 177 (1960): "Since a substantive law of foreign investment has not yet been developed, determination by fact-finding and decision-making bodies may become the primary source for the development of an international economic law of foreign investment."

<sup>64</sup> Compare DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* xi *passim* (Corbett transl. 1957); RUBIN, *PRIVATE FOREIGN INVESTMENT* 4 (1956): "International law, if it is to be a meaningful guide

This solution, of course, begs the question for those who inflexibly demand that a full-blown, substantive transnational standard for protection of foreign investment must precede effective arbitration. The sober truth is that there is an irreconcilable cleavage between newly developing countries and private foreign investors on a minimum standard for protection of foreign investment.<sup>65</sup>

A workable solution appears to be a bold forging forward with decisions based *ex aequo et bono* in individual cases.<sup>66</sup> The difficulty of this—in some aspects, at least—is not underrated; but it does not appear intractable.<sup>67</sup> And it appears almost the only feasible basis in an area in which the bases for awards are ill-defined.<sup>68</sup>

If arbitral awards were rendered on this basis, one can foresee

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to present conduct, must equally reject the isolation of principle from the test of applicability."

<sup>65</sup> See note 54 *supra*. See also AM. Soc'y INT'L L., REPORT OF THE NEW YORK REGIONAL MEETING 11-12 (1961) (remarks of Dr. Jorge Castaneda): "There is another interesting aspect to this problem. . . . Most under-developed countries would rather tend to feel, I think, that the concept of the minimum standard was created by the practice of the highly industrialized nations in the past in their relations with the under-developed countries, in situations of great inequality, especially in the last century and the beginning of this century. . . . [N]o matter how you look at the problem and no matter how you try to explain and justify the minimum standard, a claim by foreigners for rights that could be greater than those enjoyed by nationals amounts to a claim for a privileged and discriminatory position. Discrimination in reverse, so to speak, discrimination against nationals in their own country. That is why I believe that the peoples of under-developed countries will not accept the rule of the minimum standard, because it amounts to maintaining that international law authorizes these people to be discriminated against by foreigners in their own countries. This is a very grave matter of principle, and if one is sufficiently far-sighted, one would realize that in the end, this will be more important than considerations of immediate economic advantage. Possibly in the future, when under-developed countries are faced with the dilemma of granting a privilege situation to foreigners, of giving them greater rights than to their own nationals, in return for immediate economic benefits, some may feel doubts as to what they prefer."

<sup>66</sup> Compare Snyder, *supra* note 62, at 491: "Arbitral decisions can be based *ex aequo et bono*. Whatever the merits of *contra* arguments, there has been successful arbitration in the past where fixed substantive arbitral rules were lacking." See *State Ry. of Wuerttemberg v. State Ry. of Hungary*, 18 Bulletin des transports internationaux par chemins de fer 375 (No. 17) (Ger. 1909); *South German Frontier Ry. v. Administrator of the Swiss Ry. Ass'n*, 5 Bulletin des transports internationaux par chemins de fer 893 (No. 4) (Ger. 1897).

<sup>67</sup> As Lord Denning is said to have said: some lawyers find difficulties for every solution; others find solutions for every difficulty. The important task is to get the latter type in positions of leadership and where their influence may be most felt.

<sup>68</sup> It should be noted that a decision based *ex aequo et bono* is different from one based on general principles of law recognized by civilized nations. The *Division of Water from the Muese*, P.C.I.J., ser. A/B, No. 70, at 76 (1937) (Opinion of Hudson, J.).

that perhaps within the next decade after arbitration was begun full scale, a body of reasonable, reconcilable precedent would begin to emerge.<sup>69</sup> The answer—like so many in the gray area of law, sociology, economics and business—lies neither in a blind adherence to abstract legal theory nor an arrogant assertion of business reality. Somewhere between the shifting sands of parched pragmatism and the impotency of pure principle, there is a course which will make of this facet of transnational law and economics a vital, practical standard of conduct. But let us come to grips with specifics. How in pragmatic terms can this be accomplished?

### A SOLUTION

The writer's view has been suggested previously in this article.<sup>70</sup> To iterate: a system of regional, arbitral tribunals to adjudicate foreign investment disputes needs to be established. The tribunals should be ad hoc ones composed of three competent, knowledgeable, respected arbitrators versed in the field of international law or transnational investment or both.<sup>71</sup> There should be a permanent secretariat to administer the provisions of the convention establishing these regional tribunals and to provide services for them. There should be basic rules of procedure and—equally important—rules of enforcement of arbitral awards. In short, regional arbitration should be institutionalized.<sup>72</sup>

In order to move in the direction of reasonable uniformity of awards there should be an appellate arbitral tribunal to which appeal (on other than a question of fact) may lie from an award of a regional arbitral tribunal.<sup>73</sup> There should, perhaps, be an absolute

<sup>69</sup> Compare this oft-quoted passage by Professor Paul Freund, written in another context: "These abstractions, arranged in intransigent hostility like robot sentinels facing each other across a border, can become useful guardians on either hand in the climb to truth, if they can be made to march together. Somehow the lifeblood of the concrete problem tempers the mechanical arrogance of abstractions." Freund, *Thomas Reed Powell*, 69 HARV. L. REV. 800, 802-03 (1956).

<sup>70</sup> See text at notes 15-24 *supra*.

<sup>71</sup> The "system of selecting . . . [arbitrators should produce] men who are capable of understanding the nature of the issues, data, and arguments to be presented, and who have, as a result of the system of selection, or can obtain from the parties the knowledge necessary to wise decisions." Ment-schikoff, *Commercial Arbitration*, 61 HARV. L. REV. 846, 847 (1961).

<sup>72</sup> The writer has prepared a draft convention for establishment of regional foreign investment arbitral tribunals. It will be published at a later date with a commentary.

<sup>73</sup> Compare the review of the United Nations Administrative Tribunals' awards by the International Court of Justice. The Legal Adviser, UNESCO,

right of appeal to this appellate tribunal under certain enumerated circumstances; certainly there should be a privilege of appeal in the discretion either of: (1) the appellate tribunal; (2) the tribunal which made the award; or (3) some impartial agency loosely connected with the appellate tribunal. And there should be a procedure by which the appellate tribunal could decide questions of law certified for decision by a regional tribunal. This might be considered analogous to an advisory opinion given by the International Court of Justice except it would be binding.

Appeal might be by a system similar to that by which appeal lies in civil cases to: (1) the United States Supreme Court; (2) the House of Lords in the United Kingdom; or (3) the *Cour de Cassation* in France—or, for that matter, the system of appeal in civil cases in any mature juridical system.

The system should have withstood the test of time and experience; it should work reasonably well and not be cumbersome. The important thing is to get a workable system upon which states concerned can agree. There is no reason to believe this problem is intractable providing states realize that the cost of failure may come high in the next few decades.

The arbitrators of the appellate tribunal should, it is submitted, be permanent (at least as opposed to ad hoc) ones. This might be on a basis similar to that of judges of the International Court of Justice or the Court of Justice of the European Communities.<sup>74</sup> In the event they, themselves, examined petitions for appeal, it would seem not unreasonable to think that nine to twelve arbitrators would be necessary. In the event another agency examined these petitions, perhaps six to nine would suffice.

These arbitrators would have to be men of the highest caliber, competence and knowledge. This, of course, is a cliché and trite; but it is nonetheless true and necessary. Some (perhaps half or

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has said that this "may encourage the establishment of a unified jurisprudence in international administrative law." U.N. Doc. No. A /1917/Add. 1, at 3 (1955).

<sup>74</sup> See Statute of the International Court of Justice arts. 13-24; Treaty Establishing the European Economic Community arts. 165-67. See also Donner, *The Court of Justice of the European Communities*, in *LEGAL PROBLEMS OF THE EUROPEAN ECONOMIC COMMUNITY AND THE EUROPEAN FREE TRADE ASSOCIATION* 66 (1961): "The authors of the Treaty departed from the customary appointment of the judiciary for life in view of the uncertainty regarding the evolution of their tasks, although it is to be presumed that, as a general rule, judges will be appointed till they have passed the age of seventy."

approximately so) should be respected international jurists or publicists who also have recognized competence in transnational commercial matters including transnational investment; the remainder should be respected men in the world of transnational commercial matters, including transnational investment, who have judicial temperament and have had experiences as members of a tribunal arbitrating disputes concerning transnational commercial matters or investment or both.

Now, there are, no doubt, objections—some quite vigorous, others less so—to these proposals. One of them is that it is “visionary.” True, but one might answer that rather imprecise, trite objection by an equally imprecise, trite retort: these are “visionary” times. Another is that it is expensive. True, but it is relatively inexpensive if it will help to maintain a reasonable flow of capital from those nations having a surplus to those countries needing it. Another is that arbitrators should be businessmen, nor jurists. There is merit in this argument. It is the view of the writer that they should be both businessmen and jurists.<sup>75</sup> Still another objection is that the arbitrators on the regional tribunals should be chosen by an impartial, objective body (not by the parties to the dispute) from among a panel of arbitrators. While this plan may be desirable in some ways, it is probably not necessary or feasible at this juncture for at least two reasons.

*First:* it is submitted that the advocacy of a party's view by an arbitrator is currently somewhat overdrawn when the arbitrator chosen by the party is a mature, distinguished, respected, knowledgeable person. In addition, there may be practical factors urging him to be impartial: (1) whether he is jurist or businessman, he realizes if he is partial, arbitration becomes a mockery and there may well be no effective, impartial means of settling similar disputes; (2) if he is a businessman, he knows there may be an arbitration proceeding in the future in which he may be a party—he does not want the system rigged or biased.<sup>76</sup>

*Second:* it is submitted that parties themselves would prefer each to name an arbitrator, at least when the system begins functioning. Perhaps later when the plan has had a testing period, arbitrators may

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<sup>75</sup> See note 71 *supra*; text at note 20 *supra*.

<sup>76</sup> Compare Schoonmaker, *International Arbitration and the Association of Food Distributors*, in *INTERNATIONAL TRADE ARBITRATION* 259, 266 (Domke ed. 1958).



be chosen by another method. But initially (when a certain amount of sovereignty is relinquished, in any event) states may feel that they would like—and they would like their nationals to have—the right to appoint one of the three arbitrators.

Moreover, if arbitrators had to be named from members of a panel selected by parties to a convention establishing a regional tribunal, foreign investors might be wary. This is not to say, however, that there would be partiality on the part of these arbitrators; it is simply to say that at this juncture, the imprimatur of impartiality is as important as actual impartiality. In another half century or century, this factor may lose most, if not all, of its importance. (For reasons that are obvious it is not a factor in selection of permanent arbitrators of a supreme appellate arbitral tribunal.)

This then is a means by which foreign investors and newly developing countries may resolve disputes concerning foreign investments. The important, new (perhaps startling, to some international jurists) suggestions are: (1) to make greater use of businessmen as arbitrators; and (2) to base awards *ex aequo et bono*. (Perhaps two of the arbitrators on a three-man tribunal should be businessmen; on the appellate tribunal, perhaps half.) In the writer's view this is the most feasible way to gain widespread acceptance and use of arbitral tribunals by foreign investors and newly developing nations. Investors, it is submitted, are not going to agree to arbitrate a dispute involving vital interests as long as they feel the award depends on the thinking of (they assert) archaic, inflexible, unrealistic minds—in short, academically oriented, traditional international jurists.<sup>77</sup>

Newly developing states, it is submitted, are not going to agree to arbitrate a dispute involving vital interests as long as they feel the decision depends on (they assert) archaic, inflexible, unrealistic standards—in short, international law which they did not help to shape.<sup>78</sup>

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<sup>77</sup> Compare Mentschikoff, *supra* note 71, at 846-47, 857, 859-60. The writer's draft convention for establishment of a regional foreign investment arbitral tribunal provides: "Each arbitrator and the umpire shall be a person of recognized competence in international law or international commercial matters (including international investment), or both." The writer intends that the permanent arbitrators of his proposed Supreme Appellate Arbitral Tribunal be half businessmen and half jurists, or approximately so.

<sup>78</sup> See, e.g., note 65 *supra*; Porter, *Multilateral Protection of Foreign Investment*, 3 INT'L DEVELOPMENT REV. 23, 26 (1961): "A widely held view was expressed by the Mexican representative, Senor Castaneda: nearly half

These proposals are *not* a complete answer to the problem of maintaining a reasonable flow of investment capital to newly developing countries. In operation, however, they may serve as a greater part of that answer than appears at first blush. It may be that the certainty that disputes concerning foreign investment will be fairly and expeditiously resolved will, on the one hand, encourage foreign investors to invest in newly developing countries; and on the other, it may encourage those countries to be more thoughtful in their treatment of foreign investment.

### CONCLUSION

What if we fail to maintain a reasonable flow of investment capital to newly developing nations? What is the alternative? One does not know certainly, of course. But if the past is a harbinger of the future (and historians assert it is, without doubt) the consequences may be the end of western civilization, as we know it.

Throughout history, civilizations have flourished, withered and died. This was not because a particular civilization lacked material resources, affluence, means; but rather because of a loss of confidence, motivation, will. To be more precise, it was because of an

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of the nations represented in the United Nations have come into being since the main body of international law was formulated; they question their obligation to be bound by rules which they had not helped to create." *Contra*, Domke, *Foreign Nationalizations*, 55 AM. J. INT'L L. 585 (1961): "International law, far from being an outgrowth of only Western concepts, is indeed an expression of fundamental embodied in long established legal systems throughout the world. Islamic law, for instance, which is of real significance for one sixth of the world population, in the Middle East, Pakistan, Southern Asia and parts of Africa clearly embodies the universal maxim of the protection of acquired rights."

The writer's draft convention for establishment of a regional foreign investment arbitral tribunal provides that unless the parties to the arbitration proceeding agree otherwise, the tribunal decides a dispute referred to it *ex aequo et bono*. But if a party alleges that the conduct of the other, or another, party constitutes a breach of international law, the tribunal may adjudicate this issue at the same time it adjudicates issues decided *ex aequo et bono*. The writer submits that the view that this precludes reasonable uniformity of awards is overdrawn; but in any event, inflexible uniformity in any justiciable matter must give way to justice in a particular case. Compare Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 192-93 (1933), in which a method of determining applicable legal concepts is suggested in a conflict of laws problem that "would not be the result of the automatic operation of a rule or principle of selection but of a search for a just decision in the principal case"; JESSUP, *TRANSNATIONAL LAW* 106 (1956): "There is no inherent reason why a judicial tribunal, whether national or international, should not be authorized to choose from all these bodies of law the rules considered to be most in conformity with reason and justice for the solution in any particular controversy."

inability to come to grips with and solve a crucial problem affecting the basis of that civilization.

An apposite example is the Chinese civilization in the eighteenth century. It was self-reliant, buoyant, affluent and universally acclaimed. Voltaire, the French philosopher and author, characterized it as the perfection of "moral science"; Leibnitz, the German philosopher, praised it highly.

The unfortunate truth is that the Chinese considered members of western civilization to be barbarians. Chinese civilization scornfully brushed aside every foreign thing as demeaning and contemptible; it tried to ignore Europe. It was supremely confident and wealthy. Within one hundred years western entrepreneurs and governments controlled the economic and political life of the Chinese people. A new form of civilization—in the modern idiom, a new ideology—had overwhelmed and supplanted the supremely confident and wealthy Chinese civilization. The industrialized non-communist world today stands in a position analogous to that of the Chinese civilization of the eighteenth century. It is affluent as never before in history. All things considered, it is confident of the superiority of its way of life.

But what if it fails to face the challenge of industrializing the newly developing nations? Is the noncommunist world's inability to face up to the challenge of private foreign investment and its protection to lead to loss of confidence, affluence and, ultimately, freedom? Is it possible that western civilization as we know it today will pass into oblivion?